RECENT CASES.

ADMIRALTY—THE TITANIC—LIMITATION OF LIABILITY—The owners of the Titanic filed a petition in the circuit court for a limitation of their liability under the laws of the United States (U. S. Comp. Stat., 1901, pp. 2943-4) and Admiralty Rules 54 and 56. Such laws limit the liability to "the interest of such owner in such vessel and her freight then pending." This amounted to the value of some fourteen life-boats. On the ground that the Titanic was a British registered vessel lost on the high seas not within the territorial waters of the United States, it was contended that the law of Great Britain would apply and not that of this country. *Held:* The owners of the Titanic can maintain proceedings in the courts of the United States and said courts will apply the limited liability laws of the United States and not the law of Great Britain. Oceanic Steam Navigation Co. v. Mellor, 34 Sup. Ct. Rep. 754 (1914).

The general proposition that foreign ships may resort to the courts of the United States for limitation of liability under Rev. Stat. §4283 has been established where collisions have taken place between an American and a foreign vessel, The Scotland, 105 U. S. 24 (1881), and between two foreign vessels, La Bourgoyne, 210 U. S. 95 (1907). But see *dictum* of Bradley, J., in The Scotland, *supra,* that if two vessels belonging to the same nation were involved, the court would decide the case under the law of the ship's flag. At first instance it would seem that the court had gone to an unnecessary extreme in applying the law of the United States to the principal case. Fundamentally the law of a nation has no extraterritorial effect, and where a single foreign vessel alone is involved, the necessity of a neutral court is not apparent as where vessels of different nations have collided. With rare exception, the liability in tort between parties is fixed by the law of the jurisdiction within which the wrong is done—*i. e.,* England in the case of the Titanic. American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909). Yet the laws of the *forum* may refuse to enforce this foreign law if it conflicts with domestic laws. This Congress has done in limiting recovery in the case of loss of lives and cargoes on the high seas, U. S. Comp. Stat., 1901, *supra.* On this then, the court has based its decision, contending that it is in accord with its former decisions and refusing to apply the undoubted logic in Mr. Justice Bradley's *dictum.*

The Titanic case has likewise been adjudicated in England. Ryan v. Oceanic Steam Navigation Co., 110 Law Times, 641 (1914). In Great Britain the liability of ship-owners is arranged according to the tonnage of the ship. Merchants' Shipping Act, 1894, §503. It was held that the clause on the ticket exempting the company from liability for negligent navigation was inconsistent with the passenger's contract as sanctioned by the Board of Trade under the Merchants' Shipping Act, *supra.*

CRIMINAL LAW—ATTEMPTED SUICIDE—An attempt to commit suicide is an attempt to commit felony, and within the provision of the Hard Labour Act, 1822, that, on an indictment for "an attempt to commit felony," the court has power to inflict a sentence of imprisonment with hard labor. Rex. v. Mann, 110 Law Times, 781 (1914).

By the common law of England, suicide was a felony, punishable by forfeiture of the goods and chattels of the suicide and an ignominious burial. 4 Bl. Com. 189, 190; Hales v. Petit, Plowd. 253, 261 (1563). So also an attempt to commit suicide was indictable as a misdemeanor in England. Reg. v. Doody, 6 Cox C. C. 463 (1854); Reg. v. Burgess, 9 Cox C. C. 247 (1862). In America, very few cases have arisen involving attempted suicide, and the decisions have been somewhat affected by statutes. In New Jersey, under a statute which makes all offences of an indictable nature at common law, and not otherwise provided for by act of the legislature, misdemeanors, an attempt at suicide was held to be a misdemeanor. State v. Corney, 69 N. J.

L. 478 (1903). In New York, North Dakota, and South Dakota, the Penal Code, while providing that suicide is not a crime, also provides that one who attempts suicide is guilty of a felony punishable by imprisonment. Penal Code of New York, §§2, 173, 174, 178. However, there are no reported convictions for this offence in any one of the three states. In Massachusetts and Maine, since, by statute, the degree of punishment for attempts to commit offences is measured by the punishment prescribed for each offence, if actually committed, and no punishment is prescribed for suicide, it was held that an attempt to commit suicide was not indictable. Com. v. Dennis, 105 Mass. 162 (1870); May v. Pennell, 101 Me. 516 (1906). See also King v. Ahsee (Hawaii), 2 Am. Law Rev. 794 (1867). In Pennsylvania, forfeiture for suicide having been abolished, it was held that, since there was no punishment, there was no crime, and that, as an accomplished suicide was not a crime, an attempt to commit suicide was not a crime, in the absence of a statute making it such. Com. v. Wright, 11 Pa. Dist. Rep. 144 (1902).

Although it is everywhere recognized the suicide was a felony at common law, it has been a mooted question whether suicide was murder or a distinct felony. See 3 COL. L. R. 379 and 59 U. OF P. L. R. 106, where the conclusion reached is that suicide is murder at common law. Even in those states in which suicide is held not to be a crime, one who counsels or aids another to kill himself and is present when he does so, is guilty of murder as a principal in the second degree. Blackburn v. State, 23 Ohio St. 146 (1872); Com. v. Mink, 123 Mass. 422 (1877). In Texas, where suicide is not a crime, it was held that one who furnished the means for or counselled suicide, was guilty of no crime. Grace v. State, 44 Tex. Crim. Rep. 193 (1902); Sanders v. State, 112 S. W. Rep. 68 (Tex. 1908). These cases stand alone among the reported decisions, but their reasoning would seem to be logically irrebuttable.

CRIMINAL LAW—FALSE PRETENCES—WORTHLESS CHEQUE—The mere act of giving a cheque on a bank in which the maker has no account will support an indictment for obtaining money by false pretense if there is proof that the maker had no reasonable grounds to believe that the cheque would be paid upon presentation. State v. Foxton, 147 N. W. Rep. 347 (Iowa, 1914).

The authorities are somewhat in conflict as to whether, under the universal statutes which prevail, a worthless cheque is a false pretense or token. It is well settled that where the cheque is accompanied by a false statement that the maker has funds in the bank to meet it, a conviction will be sustained. Foote v. People, 17 Hun 218 (N. Y. 1879); Taylor v. Wise, 126 N. W. Rep. 1126 (Iowa, 1910). The majority of jurisdictions hold that the mere act of giving a cheque on a bank is a representation that the maker has at the time money or credit in the bank, and if, when the cheque is given, the drawer has no funds in the bank and knows the cheque will not be paid upon presentation, this is considered a false pretense. Regina v. Jackson, 3 Campbell, 370 (Eng. 1813); People v. Wasservogle, 77 Cal. 173 (1888); Barton v. People, 135 Ill. 405 (1890); State v. Hamelsy, 52 Or. 156 (1908); 2 Bishop. Cr. Law, §430; 2 Wharton Cr. Law (9th ed.), §1170. But if one who has an account at a bank gives a cheque against it, though he has no funds on deposit at the time, this alone will not support a conviction, since the cheque might be paid upon presentation and an intent to defraud is not necessarily implied. There must be proof that the cheque is not merely an "overdraft." This is held in the principal case. Regina v. Hazelton, 23 W. Rep. 139 (Eng. 1875). But some courts refuse to consider the giving of a worthless cheque sufficient to constitute a false pretense, even though the maker knows it will not be paid. These courts require some actual affirmative representation as to its validity and worth. Blackwell v. State, 41 Tex. Cr. Reps. 104 (1899); Moxey v. State, 85 Ark. 499 (1908).

CRIMINAL LAW—PERJURY—SUFFICIENCY OF EVIDENCE—The defendant, a bankrupt, was convicted of having made a false oath in a bankruptcy proceeding, in violation of Bankr. Act July 1, 1898, c. 541, §29, b. (2). *Held:*

This offense is not of equal enormity with perjury, and the ancient rule of the common law requiring two witnesses to convict of perjury has been practically annulled. Kahn v. United States, 214 Fed. Rep. 54 (1914).

The old common law rule was that, to support a conviction for perjury, the evidence of two "direct" witnesses was required to establish the falsity of the oath on which the indictment was based. 4 Bl. Com. 358; 4 Hawk. P. C., b. 2, c. 46, §10. The reason for this rule can be found in the then current distinction between "circumstantial" and "direct" evidence. Whart. Crim. Ev., §387. But since all testimony is now considered more or less circumstantial, it has become well settled that a conviction may be had on the evidence of one witness, supported by proof of corroborating circumstances. Williams v. Com., 91 Pa. 493 (1879); State v. Faulkner, 175 Mo. 546 (1903). Some cases hold that the corroborative evidence necessary must be equivalent to the testimony of another witness. Gaudy v. State, 23 Neb. 436 (1888). But the general rule seems to be that the corroborative evidence is not required to equal in weight the testimony of another witness. United States v. Wood, 39 U. S. 430 (1840). However, in all cases, 316 (1904). Admissions of the accused are not sufficient corroborative evidence. Peterson v. State, 74 Ala. 34 (1883); State v. Hunter, *supra*. But see *contra*, State v. Blize, 111 Mo. 464 (1892).

While the rule of the majority of jurisdictions is as stated above, there are a few decisions which depart still further from the old common law rule. It has been held that evidence by one witness only of contradictory oaths of the defendant is sufficient for conviction. Rex v. Knill, 5 Bam. & Old. 929 note (1822). In West Virginia, it was held that the mere uncorroborated contradictory evidence of the prosecuting witness was sufficient, where the jury had opportunity to observe the defendant's demeanor while testifying in his own behalf. State v. Miller, 24 W. Va. 802 (1884). Where the contradiction came directly from the defendant by means of written testimony, a conviction for perjury was obtained without the aid of a living witness. United States p. Wood, 39 U. S. 430 (1840). However, in all cases, the falsity of the defendant's oath must be established by a preponderance of evidence and beyond a reasonable doubt. State v. Courtright, 66 Ohio St. 35 (1902).

CONTRACTS—PARTIAL PERFORMANCE—IMPOSSIBILITY OF COMPLETION—A sub-contractor agreed to construct a viaduct according to specifications furnished by the city engineer, the work to be paid for from time to time according to estimates. When partly finished the structure collapsed because of defects in the specifications. The sub-contractor sued for value of work done and profits he would have realized on completed contract. *Held:* He may recover for value of work done, but not for profits. Huetter v. Warehouse and Realty Co., 142 Pac. Rep. 675 (Wash. 1914).

The general principle to be regarded in cases of impossibility of performance of contracts is, that when the contract is entire and for a lump sum the loss falls on the builder. Adams v. Nichols, 36 Mass. 279 (1837); Tompkins v. Dudley, 25 N. Y. 272 (1862); but where the amount is payable in instalments, Milske v. Steiner Mantel Co., 5 L. R. A. 1105 (Md. 1906), or where contract is to perform a particular part of a larger undertaking, recovery can be had for the part performed. Hayes v. Gross, 57 N. E. Rep. 1112 (N. Y. 1896); Elliott on Contracts, Vol. 3, §1909. Where the impossibility of performance arises out of defects in specifications furnished either by the one letting the contract or a third person, decisions are not uniform as to whether the contractor may recover for the part performed. The decision in such cases depends upon whether or not the court takes the view that the person furnishing the specifications warrants to the contractor that the specifications, when followed out, will produce the result contracted for. In England and in some American jurisdictions it is held that there is no such implied warranty and that the contractor cannot recover. Thorn v. Mayor of London, L. R. [1876] 1 App. Cas. 120; Lonergan v. Loan Assn., 104 S. W. Rep. 1061 (Tex. 1907). The prevailing American view,

in accord with the principal case, is that if the work is faithfully performed in accordance with the specifications furnished, the contractor may recover even if the result contracted for is not obtained thereby. MacKnight Flintic Stone Co. v. Mayor, 160 N. Y. 72 (1899); City of N. Y. v. Pa. Steel Co., 206 Fed. Rep. 455 (1913); Bush v. Jones, 6 L. R. A. 778 (U. S. 1906); Miller & Sons v. Homeopathic Hospital, 243 Pa. 502 (1914).

CONTRACTS—PROMISE TO PAY DEBT OF ANOTHER—The defendant contracted with a third person to pay the latter's debt to the plaintiff. No assets, however, were placed in the defendant's hands for paying that indebtedness. *Held:* The plaintiff cannot sue upon the contract. Sweeney v. Houston, 90 Atl. Rep. 347 (Pa. 1914).

This case affirms the Pennsylvania doctrine, that an agreement to pay the debt of the promisee can be enforced by the creditor only when money or property was placed in the promisor's hands for the purpose of paying the creditor. Delp v. Brewing Co., 123 Pa. 42 (1888); Howes v. Scott, 224 Pa. 7 (1909). But see *contra,* Claflin v. Ostrom, 54 N. Y. 581 (1874); Lehow v. Simonton, 3 Colo. 346 (1877); Shamp v. Meyer, 20 Neb. 223 (1886).

By the common law rule, no one could enforce a contract who was not a party thereto. Price v. Easton, 4 B. & Ad. 333 (Eng. 1833); Morgan v. Randolph-Clowes Co., 73 Conn. 396 (1900); Borden v. Boardman, 157 Mass. 410 (1892). But in most of the American states a person may acquire rights under a contract to which he is not a party. Kehoe v. Patton, 23 R. I. 360 (1901); Bassett v. Hughes, 43 Wis. 319 (1877); Stein v. Deutsch, 178 Ill. App. 615 (1913); First National Bank v. Doherty, 156 Ky. 386 (1913). The cases fall into two groups: those in which the plaintiff is the sole beneficiary of the contract, and those in which the contract is for the purpose of discharging some legal obligation of the promisee to the plaintiff. If a case does not come within either of these two classes, a stranger to the contract cannot sue upon it, even though he might be benefited by the performance of the contract. Davis v. Clinton Co., 54 Ia. 59 (1880); Crandall v. Payne, 154 Ill. 627 (1895); Gate City Bank v. Chick, 170 Mo. App. 343 (1913). For further discussion of the subject see 61 U. OF P. L. R. 61, and 63 U. OF P. L. R. 53 (Nov. 1914).

CONSTITUTIONAL LAW—EUGENICS MARRIAGE LAW—POLICE POWER—A Wisconsin statute provides that every male person on applying for a marriage lisence, must file with the county clerk a physician's certificate that he is free from any acquired venereal disease. Wis. St., 1913, c. 738. *Held:* This act is constitutional. Peterson v. Widule, 147 N. W. 966 (1914).

The much talked of eugenics marriage law is here held constitutional as proper means of regulating the marriage relationship. It is upheld under the police power of the state. "The police power of a state is co-extensive with self-protection. It is that inherent and plenary power in the state, which enables it to prohibit all things hurtful to the comfort and welfare of society." Lakeview v. Rose Hill Cemetery, 70 Ill. 192 (1873); Tiedeman on Police Power, §149. The right of a state to regulate marriage by legislative enactment has been universally acknowledged and rarely disputed. The State v. Walker, 36 Kan. 297 (1887). States have forbidden intermarriage between persons within certain degrees of consanguinity. So statutes have been held constitutional which forbid the intermarriage between whites and blacks, Green v. The State, 58 Ala. 190 (1877); The State v. Jackson, 80 Mo. 175 (1883); and between an epileptic and another. Gould v. Gould, 78 Conn. 242 (1905).

In the principal case the decision was not unanimous, two judges dissenting on the ground that the statute was an infringement of the Fourteenth Amendment of the United States Constitution and of similar provisions in the state constitution.

CONTRACTS—WAIVER OF DEFENCE OF STATUTE OF LIMITATIONS—PUBLIC POLICY—A clause in a promissory note expressly waiving all rights and bene-

fits conferred by the statute of limitations is not against public policy. Parchen v. Chessman, 142 Pac. Rep. 63 (Mon. 1914).

The decisions are at variance in regard to the policy of the law with respect to agreements not to plead the statute of limitations. Some jurisdictions look upon the statute as a mere personal privilege which the defendant may or may not plead as he chooses, and these courts uphold agreements to waive the bar. Some cases are based on the ground of estoppel and some upon the force of the contract itself. State Trust Co. v. Sheldon, 68 Vt. 259 (1895); Quick v. Corlies, 39 N. J. L. 11 (1876); State Loan and Trust Co. v. Cochran, 130 Cal. 245 (1900). Other courts regard the statute as a law established for public benefit, and hence not subject to contravention by private agreement. Under this view, all such contracts to waive the statute, are void as against public policy. Crane v. French, 38 Miss. 503 (1860); Shapley v. Abbott, 42 N. Y. 443 (1870); Smith v. Gillette, 59 Texas, 86 (1883); Mills v. Bennett, 94 Tenn. 651 (1895); Union Life Ins. Co. v. Spinks, 119 Ky. 261 (1904). But in some of these jurisdictions an agreement limiting the time within which an action may be brought to a period less than that provided by the statute is held valid. Smith v. Herd, 110 Ky. 56 (1901); Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386 (U. S. 1868). Some courts express doubt as to the validity of an agreement to waive the statute for an indefinite period, but uphold contracts to forego the right for a specified time. Wells, Fargo and Co. v. Enright, 127 Cal. 669 (1900). What is the public policy of a state depends, not upon the private convictions of the judges, but upon statutes, and in the absence of legislation, upon the decisions of the courts. Vidal v. Girard's Executors, *et al.*, 2 How. 127 (U. S. 1844); United States v. Trans-Missouri Freight Assn., 166 U. S. 290 (1896).

DAMAGES—MENTAL SUFFERING—DELAY IN TRANSMISSION OF MESSAGE—By reason of the negligence of a telegraph company, a message, informing a parent of his child's dying condition, was not delivered until after the funeral. *Held:* Where the only injury resulting from negligent delay in the transmission of a telegram is mental suffering, damages are not recoverable. Corcoran v. Postal Telegraph-Cable Co., 142 Pac. Rep. 29 (Wash. 1914).

The decision in this case is in strict harmony with the rule in the great majority of jurisdictions. Western Union Tel. Co. v. Ferguson, 157 Ind. 64 (1901); Connell v. Western Union Tel. Co., 116 Mo. 34 (1893); Western Union Tel. Co. v. Burris, 179 Fed. Rep. 92 (1910). The doctrine governing these decisions rests partly on the ground that it is difficult to ascertain the truth in cases of mental pain and anxiety, Western Union Telegraph Co. v. Rogers, 68 Miss. 748 (1891), and partly on the ground that mental anguish is largely a matter of individual temperament and susceptibility. Francis v. Western Union Tel. Co., 58 Minn. 252 (1894); Kester v. Western Union Tel. Co., 55 Fed. Rep. 603 (1893). But Texas, in 1881, promulgated a doctrine, *contra* to the rule of the principal case, holding telegraph companies liable for mental suffering, caused by the delay in the transmission of messages relating to sickness or death. So Relle v. Western Union Tel. Co., 55 Tex. 308 (1881). This decision has been followed by the courts of a number of jurisdictions. Middleton v. Western Union Tel. Co., 62 So. Rep. 744 (Ala. 1913); Maley v. Western Union Tel. Co., 130 N. W. Rep. 1086 (Ia. 1911); Chapman v. Western Union Tel. Co., 90 Ky. 265 (1890). For a full treatment of the "Texas doctrine," its basis and application, see the article "Liability of Telegraph Companies," in 42 AM. LAW REG. (N. S.) 715.

EVIDENCE—ADMISSIBILITY—HOSPITAL RECORDS—In order to show that the plaintiff, who was suing for personal injuries, had aggravated his condition by misconduct at a hospital, the defendant offered in evidence a hospital record which was required to be made up every three days by an interne who based the entries partly on his own information and partly on the reports of other attendants. The latter testified in court, but the interne was at the time out of the jurisdiction and unavailable as a witness. *Held:*

It was error to exclude the hospital record from evidence. Ribas v. Revere Rubber Co., 91 Atl. Rep. 58 (R. I. 1914).

The court in this case proceeded on the theory that the record consisted of entries made in the regular course of an occupation or business, contemporaneously with the event recorded. By an exception to the hearsay rule, such entries are admissible in evidence when the entrant is dead or otherwise unavailable for testimony in court. Doe v. Turford, 3 B. & Ad. 890 (Eng. 1832); First Baptist Church v. Harper, 191 Mass. 196 (1906); Francis v. Perry, 144 N. Y. Supp. 167 (1913). The English courts require several other factors to render the record admissible. There must be a duty to a superior of keeping the record. The Queen v. Worth, 4 Q. B. 132 (Eng. 1843). The duty must be to do the very thing which the entry relates, and then to make a report or record of it, at the exact time at which it was actually recorded. Smith v. Blakey, L. R. 2 Q. B. 332 (Eng. 1867). No collateral facts recorded, but only the facts which there was a duty to record, can be proved by the entries. Chambers v. Bernasconi, 1 C. & J. 451 (Eng. 1831). The American doctrine is, in general, much more liberal than the English rule, and does not insist on the requirements stated above. Weaver v. Leiman, 52 Md. 708 (1879); Fisher v. Mayor, 67 N. Y. 73 (1876); Kennedy v. Doyle, 10 Allen, 161 (Mass. 1865). The entries, however, must be substantially contemporaneous with the events recorded. Lane v. Hardware Co., 121 Ala. 296 (1898); Bridgewater v. Roxbury, 54 Conn. 213 (1886). Some courts require the facts entered to be within the entrant's personal knowledge. Butchers' Ass'n v. Boston, 214 Mass. 254 (1913); Chaffee v. U. S., 18 Wall. 516 (U. S. 1873). Other courts admit the record in connection with the testimony of the person who actually observed the facts and reported them to the entrant. Mayor v. R. R., 102 N. Y. 572 (1886); Stettauer v. White, 98 Ill. 72 (1881). Still others admit the record without requiring the testimony of the observer. Hitchner Co. v. Penna. R. Co., 158 Fed. Rep. 1011 (1908); Insurance Co. v. R. R., 138 N. C. 42 (1905).

EVIDENCE—OTHER OFFENCES—In a prosecution for polygamy, the evidence showed that the defendant, after living with the plural wife for a few days, disappeared with her jewelry. *Held:* Evidence that the defendant stole the jewelry from the plural wife, while living with her, was admissible to show motive for the crime charged. State v. Von Klein, 142 Pac. Rep. 549 (Ore. 1914).

Although all the cases are in accord with the final decision in the principal case, there are two different theories advanced to support the decisions. One theory, which is that adopted by Mr. Wigmore, proceeds upon the fundamental principle of evidence that all facts affording any reasonable inference as to the act charged are relevant and admissible, including facts showing design, motive, knowledge, or the like, where these matters are in issue or relevant. That the facts offered consist of past criminal misconduct is immaterial. Nor does the admission of such criminal misconduct conflict with the character rule that conduct tending and offered to show had moral character is inadmissible as evidence. Evidence offered for such purpose is excluded not because of its criminality, but because of its irrelevancy, the English evidence law rule being that matter whose only probative value lies in its similarity to the act under consideration, is irrelevant. Hence past conduct, offered to show motive, is relevant and admissible as evidence, whether or not such conduct was criminal. 1 Wigmore on Evidence, §216; State v. Lapage, 57 N. H. 245 (1876). However, where the facts offered are both irrelevant and criminal, there is an additional reason for exclusion, since the criminal facts would prejudice the cause of the accused. State v. Saunders, 14 Ore. 300 (1886).

The other theory rests upon a general rule of criminal evidence that, on the trial of a person accused of crime, proof of a distinct, independent offense is inadmissible. This rule is, however, subject to numerous exceptions. People v. Molineux, 168 N. Y. 264 (1901); Shaffner v. Com., 72 Pa. 60 (1872); People v. Cunningham, 66 Cal. 668 (1885). So evidence of the com-

mission of another offense is admissible when it tends to show design or place, Wallace v. State, 41 Fla. 547 (1899); knowledge, People v. Hennsler, 48 Mich. 49 (1882); intent, Curtis v. State, 78 Ala. 12 (1885); motive, Thompson v. U. S., 144 Fed. Rep. 14 (Mass. 1906); identity, State v. Breton, 66 Tenn. 138 (1874). For cases and a general discussion of this theory, see People v. Molineux, 62 L. R. A. 193 and note. Mr. Wigmore contends that this general rule has no ground for existence, but is based upon an erroneous conception of the character-rule, viz., that the rejection of past misconduct under that rule is due simply to the circumstance that it is misconduct, and that, therefore, all misconduct should be rejected. 1 Wigmore on Evidence, §216. It does not appear upon which theory the principal case was decided.

EVIDENCE—RES GESTAE—An injured person recovering consciousness in a hospital after an accident told his mother why he was in a dangerous position and the mother offers this statement to show that at the time of the accident her son was acting within the scope of his employment. *Held:* This was not a necessary incident of the litigated act, necessary in the sense that it is part of the preparations for or emanations from that act. Hobbs v. Great Northern Ry. Co., 142 Pac. Rep. 20 (Wash. 1914).

Res gestae presupposes a main fact or principal transaction and the *res gestae* mean the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and seem to illustrate its character, Hermis v. Chicago & G. N. Ry., 80 Wis. 590 (1891). Statement was made at the time and in view of the happening and seems to have grown directly out of the happening and was made immediately after it, hence it was part of the *res gestae*. Hanover R. R. v. Coyle, 55 Pa. 396 (1867). The true test is whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part or whether merely history or part of the history of a completed past affair. McMahon v. Chicago Ry. Co., 239 Ill. 334 (1909). There seem to be two common elements in all these statements; contemporaneity and spontaneity. The statement may not be separated in time and must depend on the act. The statement must be contemporaneous. Keifer v. Life Insurance Co., 201 Pa. 448 (1902); Kyner v. Mining Co., 184 Fed. 43 (1910). As to the interpretation of the word contemporaneous, Rex v. Bedingfield, 14 Cox C. C. 341 (1879), is the leading authority for a strict interpretation of the rule, and Insurance Co. v. Mosley, 8 Wall. 397 (1869), for a rather loose interpretation. American cases have also recognized a sort of psychological contemporaneity. So the first statements of the injured party after regaining consciousness are treated as contemporaneous with the act itself since there was no action of the brain of the injured party in the meantime. Christopherson v. Chicago R. R., 109 N. W. Rep. 1077 (Ia. 1906). The length of the period of unconsciousness is immaterial. In one case the statement was made eight days after the accident, but a minute or two after the injured party first became conscious. Britton v. Washington Water Co., 59 Wash. 440 (1910). Intense suffering, such as to make it improbable for the injured party to do any deliberation, has had the same effect as unconsciousness in making the statement psychologically contemporaneous. Smith v. Stoner, 243 Pa. 57 (1914). The statement must be spontaneous as well as contemporaneous. Savannah R. R. v. Holland, 82 Ga. 257 (1888); Pledges v. Chicago R. R., 69 Neb. 456 (1903). The inability of an unconscious man to deliberate insures spontaneity of statements immediately upon regaining consciousness.

An examination of cases distinguishing between statements which are part of *res gestae* and those which are mere narrative tends to show that the distinction is rather in the circumstances surrounding the making of the utterance than in the subject matter of the statements themselves. Vaughan v. St. Louis Ry. Co., 164 S. W. Rep. 144 (Mo. 1914); Hill v. Aetna Ins. Co., 63 S. E. Rep. 124 (N. C. 1908). Where an injured man had time to deliberate, but being a deaf mute, could not communicate his thoughts for half an hour, it was held that statements then made were inadmissible, Wadele v. New York Central, 94 N. Y. 274 (1884).

GIFTS—CHILD AS SUBJECT OF GIFT—A mother gave her child, immediately after its birth, to defendant. Some months later she demanded it back, but defendant refused to give it up, claiming it was a gift and irrevocable. *Held:* In no sense can a child be considered as subject matter for an absolute and irrevocable gift. Harrison v. Harker, 142 Pacif. Rep. 716 (Utah, 1914).

An agreement by which a parent surrenders the custody of his child is not binding and he is at liberty to revoke this consent and obtain the child by *habeas corpus*. *In re* Scarritt, 76 Mo. 583 (1882). Persons who take over children do not acquire an absolute right such as parents have, but merely a right secondary to the natural right of the parents, and the gift of the child by the parents, of itself and standing alone, cannot make their right superior to that of the parents. Chapsley v. Wood, 26 Kans. 652 (1881). Hence when a controversy arises between such parties, custody of the child will be assigned to the persons having the legal right unless it appears that they are improper persons to take care of the child. Rust v. Vanacter, 9 W. Va. 600 (1876); Commonwealth v. Briggs, 16 Pick. 203 (Mass. 1835); Herrick v. Richardson, 40 N. H. 272 (1860).

JUDGMENT—RES ADJUDICATA—A judgment in a civil suit, dependent for its determination on the establishment of facts amounting to a crime, for the commission of which the person is later indicted and acquitted, is a bar to an action for malicious prosecution of the criminal charge, in that the plaintiff in the last suit is estopped to deny the commission of the acts and his guilt in committing them. So when action is brought on an insurance policy and the insurance company wins on the defense that the insured set fire to the premises, but later the insured is acquitted of the charge of arson, yet the judgment in the action on the policy is conclusive as between the parties as to his guilt and no action for malicious prosecution can lie. Turner v. Columbia Insurance Co., 147 N. W. Rep. 114 (Neb. 1914).

At first glance it would seem proper for the court to have counterbalanced the adverse judgment and the acquittal and allowed the parties to litigate the question from the beginning, but all the cases show that so far as malicious prosecution is concerned the results of conviction and acquittal are decided on totally different grounds. Conviction is conclusive evidence of probable cause. Oppenheimer v. Manhattan Railway Co., 18 N. Y. Supp. 411 (1892); Thick v. Washer, 137 Mich. 155 (1904). And this is true although the conviction might be reversed by a higher court. Francisco v. Schmielk, 156 App. Div. 335 (N. Y. 1913); McElroy v. Catholic Press Co., 165 Ill. App. 290 (1911). Acquittal must be shown before action of malicious prosecution can be brought, but is not conclusive as to cases of probable cause. Hanowitz v. Great Northern Ry. Co., 122 Minn. 241 (1913); Eslaule v. Higgins, 159 Mo. App. 177 (1911); in fact, an acquittal is not even *prima facie* evidence of lack of probable cause, Price v. Singer Sewing Machine Co., 142 N. W. Rep. 377 (Mich. 1913).

Does the judgment in the civil suit have the same effect as a conviction? Independently of malice and probable cause, it has been held that proof of actual guilt of the plaintiff of the crime of which he was acquitted is a good defense to an action for malicious prosecution of the plaintiff for that crime Threefoot v. Nuckals, 68 Miss. 116 (1890); Thucher v. Building & Loan Asso., 118 N. C. 129 (1896). There is a Pennsylvania case which stands for the same proposition, but it is robbed of much of its force by the incidental mention of the fact that the defendant in the malicious prosecution suit was aware of the facts establishing plaintiff's guilt, although he was unable to procure conviction. Ruffner v. Hooks, 2 Pa. Super. Ct. 278 (1896). A former judgment between two parties binds them as to all matters on the determination of which the judgment in the former suit depended, although the second suit is on a different cause of action. Cromwell v. Sac County, 94 U. S. 351 (1874), followed in Stokes v. Foote, 172 N. Y. 327 (1902), and Union Life Insurance Co. v. Drake, 214 Fed. Rep. 536 (1914). As between the parties to the action in the principal case then, the plaintiff is estopped

to deny that he committed the acts and thus having admitted that there was such a judgment against him, the face of the pleadings show his guilt, which is a defense and judgment on demurrer was properly for defendant.

JURORS—CHALLENGE—An erroneous overruling of a challenge for cause is not ground for reversal, even though the peremptory challenges are thereafter exhausted, unless it be further shown that an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. Colbert v. Journal Pub. Co., 142 Pac. Rep. 146 (N. M. 1914).

This case is in accord with the view adopted in most jurisdictions that even where peremptory challenges are exhausted, unless an objectionable juror was forced upon the challenging party, the verdict will not be disturbed. Scragg v. Sallee, 140 Pac. Rep. 706 (Cal. 1914); Spies v. People, 122 Ill. 1 (1887); Johns v. State, 55 Md. 350 (1880). Many jurisdictions, however, adopt the contrary view, holding that such refusal is ground for reversal, when appellant exhausts all his peremptory challenges before the jury is drawn. State v. Brown, 15 Kan. 400 (1875); Tramway Co. v. Carson, 123 Pac. Rep. 680 (Colo. 1912). The reason given for the decisions in the latter cases is that the practical result of the disallowance of a challenge for cause is to reduce the number of peremptory challenges to which appellant is by law entitled, which error may be seriously prejudicial to him. It is quite uniformly held that the erroneous overruling of a challenge for cause is a "harmless" error, where the appellant does not use all of his peremptory challenges, and especially if the juror objected to is subsequently dismissed by a peremptory challenge. Burt v. Panjaud, 99 U. S. 180 (1878); Commonwealth v. Fry, 198 Pa. 379 (1901); Thomson on Trials, vol. 1, §115. It has been held that no obligation rests upon a party to use his peremptory challenges to exclude a juror challenged for cause, and that the error is reversible. Sampson v. Schaffer, 3 Cal. 107 (1853).

LANDLORD AND TENANT—FORFEITURE—BANKRUPTCY—A court of bankruptcy acting in its equity jurisdiction, will not grant a petition of a lessor to enforce forfeiture of a leasehold for breach of condition against bankruptcy, since there is a solvent sub-tenant, agreeable to the lessor, using the premises as prescribed by the lessor, there having been no attempt on the part of the bankrupt estate to get hold of the leasehold and dispose of it contrary to lessor's wishes. *In re* Lackey, 214 Fed. Rep. 867 (1914).

The sub-tenant is bound by the forfeiture by his lessor, the original lessee, Eten v. Suysten, 60 N. Y. 252 (1875); Cushner v. Westlake, 43 Wash. 690 (1906). So also the act of the sub-tenant may give the original lessor right to declare leasehold forfeited. Miller v. Prescott, 163 Mass. 12 (1895). A provision for forfeiture in case of bankruptcy is valid. Hunter v. Gallins, 2 Term R. 133 (Eng. 178); Mitchinson v. Coates, 8 Term R. 57, 300 (Eng. 1799). But, when he has equities, the sub-tenant may ask to be relieved from forfeiture. Berney v. Moore, 2 Ridg. App. 310 (Eng. 1791). Equitv will not ordinarily lend its aid to enforce a forfeiture. The parties are left to their remedy at law. Bird v. Hawkins, 58 N. J. Eq. 229 (1899); Wick v. Budin, 189 Pa. 83 (1899). Exceptions have been made where the party seeking forfeiture has special equities as in mining leases. Brown v. Vandergrift, 80 Pa. 142 (1875); Laurel Creek Coal Co. v. Browning, 99 Va. 528 (1901). The general American rule as to relief from forfeiture for breach of nonpecuniary conditions that the courts will relieve against forfeiture if the breach was caused by accident, mistake, *etc.*, and there is no actual loss or the loss is readily ascertainable in money. Martin v. Osborn, 146 Mass. 399 (1888); Henry v. Tupper, 29 Vt. 358 (1857). A court of bankruptcy has all powers of a court of equity in dealing with questions before it.

It is interesting to note that, without a provision for forfeiture on bankruptcy, bankruptcy or any disposition of the property under bankruptcy proceedings will not be deemed breach of a covenant not to assign. Farnum v. Hepner, 79 Cal. 575 (1889); *In re* Bush, 126 Fed. Rep. 878 (1904). An assignment for the benefit of creditors constituting an act of bankruptcy and

hence void under bankruptcy proceedings has been held not to give rise to forfeiture. *In re* Bush, *supra*. In England, it has been held that such an assignment does work a forfeiture. Holland v. Cole, 1 Hurl. & C. 67 (Eng. 1862). At the time this case was decided, such assignment did not constitute an act of bankruptcy and was perfectly valid.

MASTER AND SERVANT—TEST FOR VICE-PRINCIPAL—An employee of a company was injured by the negligent act of his foreman. Disobedience to orders of the foreman would be followed by dismissal. *Held:* The foreman was a vice-principal and the company was liable. Gussell v. Champion Fibre Co., 214 Fed. Rep. 963 (N. C. 1914).

Though an employee injured by negligence of a fellow servant cannot recover of his master, Railway Co. v. Surrells, 115 Ill. App. 615 (1904), an injured employee may recover of master for injuries resulting from negligence of a vice-principal. Harris v. Quarry Co., 49 S. E. Rep. 95 (N. C. 1904). In England, superior servants of a lower grade than general manager are not vice-principals. Wilson v. Merry, 19 L. T. (N. S.) 30 (Eng. 1868). Under American decisions the test whether an employee is a vice-principal or a fellow servant is not his title or rank, Railway Co. v. Doyle, 50 Neb. 555 (1897), a power to employ or discharge, Banc v. Irvine, 172 Mo. 317 (1903), but the nature of services he performs. Peirce v. Oliver, 47 N. E. Rep. 485 (Ind. App. 1897). A mere foreman is not a vice-principal. Anderson v. Winston, 31 Fed. Rep. 528 (U. S. 1887); Strange v. McCormick, 5 Clark, 10 (Pa. 1850); *contra,* Egan v. Tucker, 18 Hun 347 (N. Y. 1879). Under federal decisions neither mere superiority in rank, Railroad Co. v. Baugh, 149 U. S. 368 (1892), nor right to exercise control over other servants, Railroad Co. v. Peterson, 162 U. S. 346 (1895), will make a servant a vice-principal. But it must be shown that he is intrusted by his master with departmental control, Moss v. Compress Co., 202 Fed. Rep. 657 (1913), and it is immaterial whether or not he has the power to employ and discharge. Mining Co. v. Whelan, 12 C. C. A. 225 (1897). A mere foreman is converted into a vice-principal when he assumes to discharge the duties towards the workman which the law imposes upon the principal, Christ v. Power Co., 83 Pac. Rep. 199 (Kan. 1905). Though the power of hiring and discharging does not constitute a vice-principal, Casey v. Paving Co., 47 Atl. Rep. 1128 (Pa. 1900), the absence of that power is conclusive against the inference that a servant is a vice-principal. Bridge Co. v. Newberry, 96 Pa. 246 (1880). Under the "dual capacity doctrine" the master is liable for injuries resulting to servant from the negligence of the vice-principal acting as such, Railroad Co. v. Atwell, 198 Ill. 200 (1902), but he is not liable for injuries resulting from negligent act of vice-principle acting in the capacity of a co-laborer. Ross v. Walker, 139 Pa. 51 (1891); Meehan v. Remington, 65 N. Y. Supp. 1116 (1900). Some states do not accept this doctrine. Stone Co. v. Kraft, 31 Ohio, 287 (1877); Light Co. v. Baldwin, 62 Neb. 180 (1901). Whether a delinquent employee was a vice-principal is to be determined by the court where the facts show precisely the relation the delinquent bore to the injured employee, Callan v. Bull, 45 Pac. Rep. 1017 (Cal. 1896), by the jury when the relations of the delinquent to his subordinates are left in doubt by the evidence. Mapes v. Packing Co., 31 Pa. Super. Ct. 453 (1906).

NEGLIGENCE—THEATRE—A spectator at a theatre was injured through the proprietor's failure to keep a guard rail around the orchestra pit of his theatre. *Held:* The proprietor of a theatre is bound to use ordinary care and diligence to put and keep his place in safe condition. Failure to keep a guard rail around the orchestra pit was actionable negligence. New Theatre v. Hartlove, 90 Atl. Rep. 990 (Md. 1914).

This is in accord with the well established rule. The proprietor of a theatre is not liable as the insurer of persons attending performances, Dunning v. Jacobs, 36 N. Y. Supp. 453 (1895), but a person erecting or maintaining a place of public exhibition assumes the obligation of using all pos-

sible care to provide for the safety of those who come there, Agricultural & Mechanical Ass'n v. Gray, 118 Md. 600 (1912), and if he neglects his duty so that the hall is, in fact, unsafe, his knowledge or ignorance of the defect is immaterial. Currier v. Boston Music Hall Ass'n, 135 Mass. 414 (1883). So when the stairway of a grandstand at a race-track fell and injured the plaintiff, it was held that defendant was bound to know that the structure was safe or at least exercise the highest possible degree of care to that end, the collapse of the structure being sufficient *prima facie* evidence of negligence. Fox v. Buffalo Park, 47 N. Y. Supp. 788 (1897). The charging of admission carries with it an implied warranty that due care has been used by the defendant. Francis v. Cockrell, L. R. 5 Q. B. 184 (1870). And the defendant is not relieved from liability by the fact that other patrons of the theatre contributed to bring about plaintiff's injury, as where a crowd of spectators pressed against a defective railing causing it to break whereby plaintiff fell and was injured. Schofield v. Wood, 170 Mass. 415 (1898). In other words the duty of care that rests on proprietors of theatres and show houses is an affirmative one and is only satisfied by evidence of positive care.

PRINCIPAL AND AGENT—RATIFICATION—An insurance company's soliciting agent, contrary to the provisions of the policy, received from the insured, a promissory note in lieu of cash for the first premium. The policy was issued and delivered and the amount of the premium was charged by the company to the general agent, who in turn charged the soliciting agent. The soliciting agent negotiated the note and absconded with the proceeds. *Held:* The jury were warranted in finding that the action of the agent was ratified by the delivery of the policy and the fact that it allowed the insured to retain it for several months up to his death. Cranston v. West Coast Life Insurance Co., 142 Pac. Rep. 762 (Ore. 1914).

Ordinarily, ratification of an agent's act is a mere matter of intention. Brown v. Henry, 172 Mass. 559 (1899). The act of an agent may be ratified either by words or conduct of his principal indicating an intention to adopt the act as his own. Osborne v. Durham, 72 S. E. Rep. 849 (N. C. 1911). Thus, knowingly accepting the benefits of a transaction indicates the intention of the principal to ratify the unauthorized act of his agent. Haney School District Co. v. Hightower Baptist Institute, 113 Ga. 289 (1901). An essential element of ratification is that the principal have knowledge of all the material facts of the transaction. Beacon Trust Co. v. Souther, 183 Mass. 413 (1903); Thompson v. Murphy, 60 W. Va. 42 (1906). But the principal cannot purposely or wilfully shut his eyes to means of information and seek to retain the benefits of the act and at the same time repudiate the act. Johnson v. Ogren, 102 Minn. 8 (1907). The silence of a principal, after receiving notice of the agent's unauthorized act, may be a fact to be weighed on the issue of whether the principal ratified the act. Ratification by the principal on this ground is based upon the doctrine of equitable estoppel in that the principal has behaved in such a way that the party dealing with the agent would be injured if the transaction were repudiated. St. Louis, Gunning Advertising Co. v. Wanamaker & Brown, 90 S. W. 737 (Mo. 1905). Whether mere silence of a principal and failure to repudiate his agent's act within a reasonable time after knowledge thereof, amounts to ratification is a question for the jury. Fifth National Bank v. Iron City National Bank, 92 Tex. 436 (1899).

PROCEDURE—EXECUTIONS—TRUST ESTATE—A judgment creditor of the *cestuis que trust* under a marriage settlement may seize trust chattels on a *fieri facias,* where the whole of the equitable and beneficial interest in the chattels is vested in the judgment debtors. Stevens v. Hince, 110 Law Times, 935 (Eng. 1914).

At common law, the equitable interests of a debtor were not subject to execution under a *fieri facias,* but could be reached only in equity. Scott v. Scholey, 8 East, 467 (Eng. 1807); Cadogan v. Kennett, 2 Cowp. 432 (Eng. 1776). Section 10 of the Statute of Frauds (29 Car. II, c. 3), which made

the interest of a *cestui que trust* in lands, tenements, and hereditaments liable to execution, did not extend to personal property. Hence the principal case seems to mark an advance in the English law on the subject. In the United States, however, most jurisdictions, by statutes of varying effect, allow equitable estates and interests to be taken on execution. Kennedy v. Nunan, 52 Cal. 326 (1877); Whiteford v. Hootman, 104 Ill. App. 562 (1902); Demuth v. Kemp, 115 N. Y. Supp. 28 (1909); Robertson v. Howard, 82 Kan. 588 (1910). Some states have arrived at the same result without statute. Flanagin v. Daws, 2 Houst. 476 (Del. 1862); Atwater v. Manchester Bank, 45 Minn. 341 (1891); Anwerter v. Mathiot, 9 S. & R. 397 (Pa. 1823). A few jurisdictions follow the common law doctrines, and exempt equitable interests from legal execution. Lee v. Enos, 97 Mich. 276 (1893); Starr v. U. S., 8 App. D. C. 552 (1896); Tischler v. Robinson, 56 Fla. 699 (1908).

The common law rule was sustained by the theory that at law only legal interests could be recognized and enforced. It was not founded on any tenderness for equitable titles, but rather upon a desire to ignore them altogether. By proceedings in equity, equitable interests could always be made to contribute to the satisfaction of a judgment against the owner. The modern American procedure, by allowing such interests to be taken under *fieri facias*, obviates the necessity of a separate suit by the creditor, while it retains all the advantages thereof. Freeman on Executions, Vol. I, §116 (Ed. 1900).

PROPERTY—ADVERSE POSSESSION—RIGHT OF WAY—A railroad acquired land for its roadbed under condemnation proceedings, which were void as to some of the owners who were not made parties. Title was claimed under the order of confirmation and the railroad had full possession of the premises for forty-five years. The question arose as to whether this uninterrupted use for so long a period of time had given the railroad title to the land or simply an easement. *Held:* A claim to the rightful possession of land under such an easement is clearly hostile to the fee owners, and is the assertion of a title which adverse possession will render unassailable. Long Island R. Co. v. Mulry, 105 N. E. Rep. 806 (N. Y. 1814).

A claim of ownership to establish title by adverse possession must be hostile to the owner of the fee. Hawk v. Senseman, 6 S. & R. 21 (Pa. 1820). Thus, claims to title under a lease, Bedell v. Shaw, 59 N. Y. 46 (1874); by tenant at will, Wheeling, *etc.*, Ry. v. Cleland, 37 L. I. 466 (Pa. 1879); by mortgagee in possession or purchaser of tax lease, Gross v. Wellwood, 90 N. Y. 638 (1882), are all insufficient as bases to claims for title by adverse possession. Such permissive possession cannot change to adverse possession without some evidence of ouster, Nicolai *v.* Baltimore, 100 Md. 579 (1905). There must be some unequivocal act so done as to leave no doubt in the minds of the jury that it was brought to the knowledge of the true owner. Hood v. Hood, 2 Gr. 229 (Pa. 1858).

An easement is a privilege in land existing distinct from the ownership of the soil. Pierce v. Keaton, 70 N. Y. 419 (1877). It is the right which one may exercise in or on the estate of another. Reeve v. Dwyer, 144 App. Div. 647 (N. Y. 1911). A railroad, by proper condemnation proceedings, acquires a permanent easement in land. Roby v. N. Y. C. & H. R. Ry., 142 N. Y. 176 (1894). Had the proceedings in the principal case been regular and all owners of the land made parties thereto, the railroad would have acquired an easement in accordance with this rule. Nothing having passed by condemnation, the question arose as to what rights the railroad had acquired by adverse user. That there is room for reasonable doubt in such a situation is shown by the opinion in Scheer v. Long Island R. R. Co., 111 N. Y. Supp. 569 (1908), where it was said that possession was not under claim of title, but only of a use or easement in the land.

PROPERTY—BAILMENT—DENIAL OF TITLE—An owner of grain deposited it with a warehouseman, and received a receipt for same. Afterwards the depositor presented his receipt and demanded grain. The warehouseman

refused to deliver it, claiming that the depositor was not the true owner and that he had delivered the grain to the true owner. *Held:* A bailee cannot deny the title of the bailor and the depositor may recover damages. Street v. Elevator Co., 146 N. W. Rep. 1077 (S. D. 1914).

At early common law a bailee under no circumstances could set up the defense of title in himself or in a third party, in an action by bailor for recovery of goods bailed. 9 Henry 6, 58 (1431); Krause v. Com., 93 Pa. 818 (1880). Under the modern doctrine the bailor may set up only two defences for non-delivery to the bailee: that the true owner recovered the goods by legal proceedings, Bliven v. Railroad Co., 36 N. Y. 403 (1861); Burton v. Wilkinson, 18 Vt. 186 (1846); or that the bailee delivered property to the true owner on his demand. King v. Richards, 6 Whart. 418 (Pa. 1840); The Idaho, 93 U. S. 575 (1876). In the latter instance, the bailee takes the risk, Pepper v. James, 67 S. E. Rep. 218 (Ga. 1910), and has the burden of showing that the person to whom he surrendered the property was the true owner. Transp. Co. v. Barber, 56 N. Y. 544 (1888). To preserve his own possession a bailee cannot deny the title of his bailor, Railway Co. v. Spires, 1 Ga. App. 22 (1907), neither by asserting title in himself, Thompson v. Williams, 30 Kan. 114 (1883), nor in a third person. Sinclair v. Murphy, 14 Mich. 392 (1866). A bailee is not estopped from showing that subsequent to the bailment title was acquired by bailee, Shellhouse v. Field, 97 N. E. Rep. 940 (Ind. App. 1912), or by a third person, Roberts v. Noyes, 76 Me. 590 (1885), or that title was conveyed to a third person in trust for bailee. Burnett v. Fulton, 48 N. C. 486 (1856). That bailee had been compelled by legal action, of which bailor had notice, to pay to true owner for property is a valid defense to an action by bailor. Cook v. Holt, 48 N. Y. 275 (1872). The bailee may assert a lien on the property. Burdict v. Murray, 3 Vt. 302 (1830).

SALES—WARRANTY—EFFECT OF DESCRIPTION—A vendor made a written description of a certain thoroughbred colt which he had for sale. It was claimed that this amounted to a warranty that the animal was as described; therefore since the colt did not conform to the description, that the vendee might keep him and recover for breach of warranty. *Held:* This was no express warranty but rather a condition precedent that the colt should be as described, and since the vendee accepted the colt and, though dissatisfied with him, expressed his readiness to pay for him, he was estopped from later claiming damages for failure on the part of the vendor to comply with the description. Brown v. Davidson, 142 Pac. Rep. 387 (Okl. 1914).

Because of the different liability which attaches it is necessary to decide whether a particular engagement of the seller is an essential part of the contract of sale and therefore a condition, or is a collateral matter and therefore a warranty. Words of description are generally not considered as a warranty, but merely as a condition precedent to any liability on the part of the buyer. This is because the qualities described are necessary to the identity of the thing sold, and if as the colt does not correspond to the description, the vendee is not obliged to pay for what he did not agree to buy. Brown v. Baird, 5 Okl. 133 (1897); Patrick v. Lombard Co., 81 Neb. 267 (1908); Shambaugh v. Current, 111 Ia. 121 (1900); Carleton v. Ayres & Co., 149 N. Y. 137 (1896). It has been said as a general proposition that descriptive statements constitute a warranty whether the seller makes them or the buyer in ordering the goods makes them. 21 H. L. R. 563 (1908). Yet this is largely true only in cases where particular goods are known generally under certain descriptive trade names. Henderson Elevator Co. v. Milling Co., 126 Ga. 279 (1906); Abel v. Murphy, 43 N. Y. Misc. 648 (1904); Hoffman v. Dixon, 105 Wis. 315 (1900).

TORTS—LIABILITY FOR VICIOUS DOG KEPT ON PREMISES—A vicious dog owned and controlled by a seventeen-year-old girl but kept on the premises of her father, with whom she lived, escaped and killed another dog. *Held:*

The father is not liable since his daughter, who, though not *sui juris* was of responsible age, controlled the dog. North v. Wood, 110 Law Times, 703 (Eng. 1914).

It has been long well settled both in England and America that he who keeps a dog known to be vicious does so at his peril, and is liable without proof of negligence for harm caused by its escape. Laverone v. Mangianti, 41 Cal. 138 (1871); Sanders v. Teape, 51 L. T. 263 (Eng. 1884); Shaw v. Craft, 37 Fed. Rep. 317 (1888); Sylvester v. Maag, 155 Pa. 225 (1893). Even the necessity of proving *scienter* has been abolished in England and in many states by statute. St. 28-29 Vict., c. 60 (Eng.); Mass. Rev. Sts., c. 58, §113; Brewer v. Crosby, 177 Mass. 29 (1858); Newton v. Cardon, 72 Mich. 642 (1888). The gist of the action is the keeping or harboring of the dog, and ownership is immaterial. McKone v. Wood, 5 C. & P. 2 (Eng. 1831); Keenan v. Gutta Percha Mfg. Co., 46 Hun 545 (N. Y. 1887); Snyder v. Patterson, 161 Pa. 98 (1894). The cases are in some confusion as to what constitutes "keeping or harboring" as required by the rule. All jurisdictions agree that the casual presence of a dog on the premises does not render the occupier thereof liable as the "owner or keeper" within the meaning of the law. Sproat v. Directors of the Poor, 145 Pa. 598 (1892); O'Donnell v. Pollock, 170 Mass. 441 (1898). So also it is settled that one who has actual possession and control of another's dog on his own premises is liable as the keeper. Barrett v. Malden Ry. Co., 3 Allen, 101 (Mass. 1861); Quilty v. Battie, 135 N. Y. 201 (1892). Where the owner of property allows another to keep a dog on the premises, though he himself may exercise no control over it, some courts hold him liable on the ground that he should not have permitted the dog to be kept by anyone on his premises. McKone v. Wood, *supra;* The Lord Derby, 17 Fed. Rep. 265 (1883); McAdams v. Starr, 974 Conn. 85 (1901). Other courts put the emphasis upon the amount of control and hold that the mere fact that the owner of premises permits another to keep a vicious dog upon them, does not of itself make the owner of the premises the "keeper" of the dog. This rule depends largely on the age, employment, and home of the real owner, and all the circumstances of the particular case. Snyder v. Patterson, *supra;* McCasker v. Weatherbee, 100 Me. 25 (1905). The fact that others shared with the defendant in the control of the dog is immaterial. Grant v. Ricker, 74 Me. 487 (1883); Lettes v. Harning, 22 N. Y. Supp. 565 (1893); Hayes v. Smith, 15 Ohio Cir. Ct., 300 (1898).

TORTS—VICIOUS DOMESTIC ANIMALS—A stockman, while driving a bull, which he had purchased, from the seller's inclosure, was attacked by the bull, thrown from his horse and killed. It appeared that the seller knew the bull was vicious. *Held:* The owner or keeper of a vicious animal, who knows of its propensity to do mischief, is liable for any injury it may inflict; the seller here is liable. Gunderson v. Bieren, 142 Pac. Rep. 685 (Wash. 1914).

This decision is in accord with the generally accepted doctrine that if the animal is vicious, and the owner knew it, he is accountable for any injury done by it without proof of negligence in restraining the animal. The gist of the action is not negligence in keeping the animal but the keeping him with knowledge of his vicious propensity, and the keeper is liable regardless of his endeavors to prevent mischief. Muller v. McKesson, 73 N. Y. 195 (1878); Harris v. Carstens Packing Co., 86 Pac. Rep. 1125 (Wash. 1906); Gordon v. Kaufman, 89 N. E. Rep. 898 (Ind. 1909). In a few jurisdictions, however, it is held that the gist of the action is the negligent failure properly to restrain the animal and that, consequently, the defendant may relieve himself from liability by showing due care in restraining the animal. Worthen v. Love, 60 Vt. 285 (1888); DeGray v. Murray, 69 N. J. L. 458 (1903). The sufficiency of the keeper's knowledge of the vicious propensity of the animal is a question of what is sufficient to convince a man of ordinary prudence of its inclination to commit injuries of the class complained of. Reynolds v. Hussey, 64 N. H. 64 (1886). The defendant is not excused from liability by the fact that the animal has never actually injured anyone before. Rider v. White, 65 N. Y. 54 (1875); Slatter v. Sorge, 131 N. W. Rep. 565 (Mich.

1911). While bound to notice the general propensities of the class to which the animal belongs, the keeper is not bound to guard against some disposition of the animal different from the species generally, in the absence of notice thereof. Domm v. Hollenbeck, 259 Ill. 382 (1913).

TORTS—UNREGISTERED MOTORCYCLE IN HIGHWAY—While plaintiff was riding a motorcycle on a public street, he was struck and injured by an automobile negligently operated by the defendant. Plaintiff had not registered his motorcycle in accordance with a city ordinance making it unlawful for unregistered motorcycles to be operated on the highway. *Held:* Plaintiff can recover. Yahachi Shimoda v. Bundy, 142 Pac. Rep. 109 (Cal. 1914).

The court in this case refused to follow the Massachusetts rule laid down in the case of Dudley v. Northampton Ry., 202 Mass. 443 (1909), where under a statute similar to that in the principal case it was held that one operating an unlicensed automobile could recover only for wanton or wilful injury. More recent cases in Massachusetts adhere strictly to the rule laid down in the Dudley case and allow no recovery. Compton v. Williams, 103 N. E. Rep. 298 (Mass. 1913); Dean v. Boston Ry. Co., 105 N. E. Rep. 616 (Mass. 1914). With this rule Bortner v. York Ry. Co., 22 Pa. Dist. Rep. 84 (1913), is also in accord. Even in Massachusetts, however, in applying another and similar section of the same statute, which required operators of automobiles to secure licenses, the court was unwilling to extend the doctrine of Dudley v. Northampton Ry., *supra*, and allowed recovery. Bourne v. Whitman, 209 Mass. 155 (1911). The general rule undoubtedly is that unless the violation of an ordinance bears a causal relation or contributes to the injuries sustained, the fact that plaintiff violated it does not bar recovery. Newcomb v. Boston Protective Dept., 146 Mass. 596 (1888); and many jurisdictions, adhering to this rule, hold with the principal case that unless the violation contributes to the accident, plaintiff can recover. Hemming v. New Haven, 74 Atl. Rep. 892 (Conn. 1910); Switzer v. Sherwood, 141 Pac. Rep. 181 (Wash. 1914); see also 62 U. OF P. L. R. 216; 61 U. OF P. L. R. 346.

WORKMEN'S COMPENSATION — OCCUPATIONAL DISEASE — The Michigan Workmen's Compensation Act provides compensation "for the accidental injury to, or death of, employes." A workman died as a result of lead poisoning, contracted in the course of his employment. *Held:* Diseases of gradual growth, though caused by the conditions of the employment, are not within the purview of the act. Adams v. Acme White Lead and Color Works, 148 N. W. Rep. 485 (Mich. 1914).

Whether workmen contracting occupational diseases are entitled to compensation depends largely upon the wording of the particular statute. Where the word "injury" alone is used in the act, recovery is allowed for diseases of gradual growth. *In re* Hurle, 104 N. E. Rep. 336 (Mass. 1914); Plasko v. American Carriage Co., 15 Nisi Prius (N. S.), 273 (Ohio, 1914). On the other hand, where, as in the English acts, the phrase "injury by accident" is used, workmen who suffer from occupational diseases cannot claim compensation. Coe v. The Fife Coal Co., 46 Scot. L. Rep. 328 (1909); Eke v. Hart-Dyke, 2 K. B. 677 (Eng. 1910). But if the disease is the result of an accident, the date of which can be definitely fixed, it comes within the scope of the English statutes. Brintons, Ltd., v. Turvey, App. Cas. 230 (Eng. 1905); Kelly v. Achenlea Coal Co., 48 Scot. L. Rep. 768 (1911). The authorities have hitherto recognized a distinction between the terms "injury by accident" and "accidental injury." See Lord Macnaghten in Fenton v. Thorley, 19 T. L. R. 684 (Eng. 1903), and 25 H. L. R. 329. In the principal case, however, the court considers the two phases as identical, basing its decision on the authority of the English cases cited above, particularly Steel v. Cammell, Laird and Co., 2 K. B. 232 (Eng. 1905). For further discussion of this subject see Bradbury's Workman's Compensation, Vol. I, p. 339 (Ed. 1914), and the article by the same author in 62 U. OF P. L. R. 329.